

- I. "That the ld. ACST failed to appreciate the facts and circumstances of the case properly while reducing the extra demand of Rs.64,039/- to Rs.6031/-.
- II. That the ld. ACAST failed to take cognizance of fact that the appellant had suppressed 32.50 quintals of paddy at the time of inspection i.e. on 20.1.88 which cannot be covered under admissible shortage in view of the dealer's stock taking on 2.1.88 and claiming of 69 quintals shortage of paddy for the entire procurement till that date. The ld. ACST should not have accepted the version of the appellant that the 32.50 quintals in question also covered within the gambit of admissible shortage.
- III. That the ld. ACST was wrong in allowing the appeal on the point of sale of gunny bags that such sales attracts tax @4% only whereas the sale of gunny bags were clear cut sales., the stock of which charges separately and attract the IV proviso of section 5(1) of the OST Act and tax on such sales should have been 8% as applicable to the sale of containers the cost of which was separately charged."

3. The brief fact of the case is that the instant dealer carries on business in paddy and rice in addition to running a rice mill. For the material period he has returned GTO and TTO at Rs.3,84,13,382.82 and Rs.3,74,91,544.47 respectively. But, on examination of books of account at the assessment stage, the LAO noticed that the appellant has received a sum of Rs.2,78,106.00 from F.C.I. towards new gunnies while supplying rice and paid tax @4%. But the LAO held that empty gunny bags are taxable @12% as unspecified item in the OST Rate Chart. Hence, he demanded the balance 8% tax in his assessment order. Apart from this, the LAO utilized two numbers of fraud reports namely report No.59 dtd.25.01.88 submitted by the STO, Intelligence Wing, Sambalpur in which it is alleged shortage of paddy of 32.50qntls; rice of 68Kg; broken rice of 87Kg and bran of 90Kg that led to sale suppression of goods. However, after proper examination of books of account with documentary evidences produced, the LAO

dropped the charges on rice, broken rice and bran but upheld purchase suppression of paddy of 32.50qntls. Secondly, in the fraud report submitted by one of the IST, Sambalpur, it is revealed that the Inspecting Officer detected excess 10 bags of paddy being transported on 21.11.87 in Truck No.ORS-8908. Whereas, in the waybill accompanying the goods in the aforesaid truck revealed 120 bags of paddy being transported, on physical verification 130 bags of paddy being transported for which tax on excess paddy was paid by the assessee, thereafter accounting the above transaction in his books of account. Since, the frauds were established by the LAO after proper examination, he enhanced the returned turnover by Rs.16,66,610.00 that resulted in an extra demand of Rs.63,039.00 in his assessment order which was challenged by the assessee in first appeal before the Id. FAA.

4. At appeal, after due examination of the case, the Id. FAA reduced the demand to Rs.6,031.00 for the material period with his following observation:

- a. The appellant didn't do business in gunny bags. As per agreement entered with FCI, he has to supply rice to FCI duly packed in gunny bags. However, for the sake of accounting facilities, the FCI paid a agreed price for each gunny bag received along with rice. There was no occasion or reason to sale gunny bags separately to the FCI and gunny bags were sold as container of rice. Taking into consideration the judgment of Hon'ble Orissa High Court in case of State of Orissa Vs. Habib Rahimtullah and Co. reported in 51 STC 403, he taxed gunny bags @ 4% as per forth proviso of section 5(1) of OST Act.
- b. As regards alleged shortage of paddy of 32.50 qntls of paddy, he observed that the shortage was within the allowable limit as prescribed by the Civil Supplies Department. He further observed that the progressive procurement of paddy upto 19.01.1988(date of inspection being 20.01.1988) was 45,605.50 qntls. and admissible loss due to moisture, evaporation and

driage as per Civil Supplies norm works out to 570.08qntl (loss allowed for 1250gm against stock of 1qntl paddy). Compared to this, 69qntl shortage already claimed by the appellant on 02.01.1988 and 32.50qntl shortage as detected by the Inspecting Officers totalling to 101.50 qntl is negligible and remained within the permissible limit. Moreover, he observed that the Hon'ble Orissa Sales Tax Tribunal have held in the cases of State of Orissa Vs. Venkateswar Rice Mills reported in S.A. No.302 of 1991-92 and Sri Annapurna Rice Mill Vs. State of Orissa reported in S.A. No.1531 and 1532 of 84-85 that a rice miller handles huge quantity of paddy and rice and it is impossible in his part to make physical weighment of the stocks everyday so as to find out the shortage if any and record the same in stock register daily. In the case of Mahavir Rice Mill, the Hon'ble Orissa High Court, reported in (1983) 54 STC 218, held that shortage in stock can never be a basis to conclude that there has been suppression of sale. As such, presumption of suppression and consequent enhancement, basing on eye estimated physical stock is beyond the principle of natural justice and fair play. Accordingly, he dropped the enhancement of turnover on this score, being not sustainable.

- c. However, on excess stock of 10 bags of paddy detected by the Check Gate Officials of the Bargarh Commercial Tax Check Gate on 21.11.1987 transported in Truck No.ORS-8908 & not covered in waybill and in transit pass bearing No.57552 issued by the Civil Supplies Department, he established the above suppression whose cost was quantified at Rs.1500/- for which he enhanced the turnover by Rs.1,50,000.00.

All these resulted in a reduction of demand to Rs.6,031.00 by the Id. FAA in his appeal order for the relevant year which is now challenged by the State in the present second appeal.

5. Mr. M.L. Agarwal, Standing Counsel for the appellant-State, during the course of hearing argued that reduction of rate of tax on

sale of gunny bags from 12% to 4% is illegal. The assessee has received a sum of Rs.2,78,106.00 from FCI on account of supply of gunny bags. The imposition of tax on gunny bags is no more in *res integra* having been settled by the Hon'ble Orissa High Court in case of Sri Durga Rice Mills Vs. State of Orissa reported in (2021) 90 GSTR 185 (Ori.). He further argued that judgment of Hon'ble Orissa High Court rendered in Mahavir Rice Mills case reported in (1983) 54 STC 218 & quoted by the ld. FAA in his order is not applicable to the present facts and circumstances of the case in as much as that on 02.01.1988, the Civil Supply Officer found shortage of 69 qntls of paddy which was allowed leaving a closing stock of paddy at 13184qntls. However, on 20.01.1988 the stock as per books of account stood at 14387.50qntls whereas, the physical stock was found to be 14355.00qntls by the Investigating Officials of Intelligence Wing, Sambalpur, leading to shortage of 32.50qntls which is unbelievable. A shortage of 32.50qntls of paddy cannot occur within a short span of merely 18 days (from 02.01.1988 to 20.01.1988) which is highly improbable. Accordingly, he argued that the assessment order passed by the LAO may be restored, being just and proper and in accordance with the provisions of law and the appeal order of the ld. FAA may be rejected.

6. Per contra, Mr. B.P. Mohanty, ld. Counsel for the dealer-respondent argued that the appeal order passed by the ld. FAA is just, legal, proper and there is no infirmity in the impugned order. Hence, he submitted to dismiss the appeal and confirm the order of the Ld.FAA.

7. In view of the rival contention of the parties, the following issues emerged for adjudication by this Tribunal:-

- a) Whether, in the facts and circumstances of the case, gunny bags sold along with rice to FCI is exigible to tax @4% or @12% as an unspecified item in the OST Rate Chart?
- b) Whether, in the facts and circumstances of the case, the ld. FAA is justified in dropping the allegation of shortage of

32.50qntls of paddy as it is within the prescribed limit of Civil Supplies Department?

Addressing to the issue No.a), it is pertinent to quote the relevant provision of the statute. Fourth proviso to Section 5 (1) of OST Act, *inter alia* speaks that **“provided also that the sale of containers of taxable goods, when sold with such goods but not charged separately, shall be subject to payment of tax at the same rate as the goods contained therein.”** It is seen from the orders below that in terms of the contract with the FCI, the assessee was required to sale the levy of rice with its container i.e. gunny bags. The assessee accordingly received new empty gunny bags from FCI and has paid sales tax at the rate prescribed under fourth proviso to Section 5(1) of the OST Act. This is a similar case with that of M/s. Sri Durga Rice Mill. In the aforesaid case, in STREV No.80 of 2006, the Hon’ble Orissa High Court in their order dtd.19.04.2021 has held as under:

“9.An added feature as far as the present case is concerned is that packing material was in fact sold as “new unused gunny bags” and separately paid for by the FCI. In ***Raj Sheel v. State of Andhra Pradesh*** (*supra*), the Supreme Court has observed as under:

“It is therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depend on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing but where any packing material is of significant value it may imply an intention to sell the packing materials. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on it own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors some of them being:

1. *The packing material is commodity having its own identity and is separately classified in the Schedule.*

2. *There is no change, chemical or physical in the packing either at the time packing or at the time of using the content;*
3. *The packing is capable of being reused after the contents have been consumed.*
4. *The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing ;*
5. *The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product.”*

10. In the considered view of the Court, in the present case the Tribunal was right in applying the law explained by the Supreme Court in *Raj Sheel v. State of Andhra Pradesh (supra)*, and concluding that the question had to be answered against the assessee and in favour of the Department. Factually, since it has been shown by the Petitioner that the aforementioned new gunny bags were separately sold and paid for by the FCI, the question framed by this Court is required to be answered in favour of the Department by holding that in the facts and circumstances of the case, the gunny bags sold along with the rice to the FCI is exigible to tax @ 8% as held by the Tribunal.”

As such, by applying the ratio of above judgement, the present assessee is liable to pay the differential tax of 8% on gunny bags.

On the issue of shortage of 32.50qntls of paddy, we observe that the progressive procurement of paddy up to 19.01.1988 (date of inspection being 20.01.1988) was 45,605.50qntls and admissible loss due to moisture, evaporation and driage as per Civil Supplies Deptt. norm works out to 570.08qntls (loss allowed for 1250gm against stock of 1qntl of paddy). Compared to this, 69qntls shortage has already been claimed by the assessee on 02.01.1988 and 32.50qntls shortage as detected by the Intelligence Wing, totalling to 101.50qntls which is negligible and remained within the prescribed permissible limit. Moreover, it has been aptly decided by this Tribunal in S.A. No.302 of 91-92 and S.A. No.1531 & 1532 of 84-85 (*supra*) that a rice miller

handles huge quantity of paddy and rice and it is impossible in its part to make physical weighing of stocks everyday so as to find out the shortage if any and record the same in the stock register daily. The estimate of stock recorded on the basis of eye estimation is beyond the principle of natural justice that will lead to error in proper judgment and thus not sustainable. Accordingly, we agree to the observation of the Id. FAA on this score. However, on detection of excess stock of 10 bags of paddy by the Check Gate Officials which was not covered in the waybill and transit pass issued by Civil Supplies Department while transporting the same in vehicle No.ORS-8908, we observe that in order to square of the issue, the assessee has entered the above excess stock in his books of account after payment of tax which is an afterthought in camouflaging his illegal out of account transaction. The Id. FAA has rightly established the suppression of 10bags of paddy which he quantified at Rs.1500/-, enhancing the turnover by Rs.1,50,000.00 that appears reasonable to us, calling for no further interference.

8. Accordingly, it is ordered.

The appeal filed by the appellant-State is allowed in part and the case is now remanded to the LAO for re-computation of tax in the light of our above observation which may be completed preferably within two months from the date of receipt of copy of this order after giving the assessee a reasonable opportunity of being heard.

The case is disposed of accordingly.

Dictated & corrected by me.

Sd/-
(Srichandan Mishra)
 Accounts Member-II

Sd/-
(Srichandan Mishra)
 Accounts Member-II.

I agree,

Sd/-
(A.K. Das)
 Chairman.